

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MOHAMMAD GOLAMRABBANI SARKAR</b>	:	DETERMINATION DTA NO. 820399
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law for	:	
the Period March 1, 2001 through August 31, 2002.	:	

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Petitioner, Mohammad Golamrabbani Sarkar, 1225 Sheridan Avenue, Apt. #4B, Bronx, New York 10456, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2001 through August 31, 2002.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 9, 2005 at 10:30 A.M., with all briefs to be submitted by November 28, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, Esq., of counsel).

***ISSUES***

I. Whether the Division of Taxation properly estimated additional sales and use taxes due from petitioner on sales of food and beverages.

II. Whether petitioner was liable for the collection and payment of sales and use taxes as a licensed operator of a pushcart who made sales of food and beverage during the audit period.

***FINDINGS OF FACT***

1. Between March 1, 2001 and August 31, 2002 (the “audit period”), petitioner, a licensed New York City mobile food vendor, operated a pushcart on the corner of 44<sup>th</sup> Street and 8<sup>th</sup> Avenue in New York City, making sales of hot dogs, sausages, hot pretzels, soda and water.

2. Petitioner was interviewed at his work location on June 18, 2002 by a Division of Taxation (“Division”) investigator who reported that petitioner worked at the location for about eight hours per day, five days per week and six months per year. Petitioner informed the investigator that he was an employee of “Mohamud Chorich,” but furnished no evidence of this relationship such as a wage and tax statement, form W-2.

3. The investigator spent approximately 20 minutes with petitioner, beginning at about 1:15 P.M., during which time petitioner served two customers. It was observed that petitioner charged one dollar for hot dogs, soda and water and one dollar and twenty-five cents for sausages and hot pretzels.

4. No business records or sales information were provided to the investigator, although requested, and none were furnished to the Division’s Sales Tax Desk Audit personnel after two separate requests made by letters dated January 8, 2003 and February 21, 2003. The letters gave petitioner the option to conduct a self audit of his records or submit to an audit by the Division. The letters both indicated an audit period of March 1, 2001 through November 30, 2002.

5. Petitioner was a licensed mobile food vendor in New York City but was not the owner of the cart he was operating on the day of the investigator’s interview. However, the investigator noted in his report that neither petitioner nor the lessor (or owner) of the cart remitted sales taxes for the period in issue.

6. Faced with a complete lack of business records, the Division resorted to an estimated audit methodology for calculating the sales tax due from petitioner for the audit period. Based on the investigator's interview, petitioner was determined to be a "small" hot dog vendor and the Division, relying on office experience based on many audits with such vendors, estimated daily sales of \$300.00. This amount was applied to the number of days worked by petitioner in the audit period, 240, computed using his information on days and months worked, and resulted in gross sales for the audit period of \$72,000.00. The Division used office experience to discern a taxable ratio of 95%, which yielded audited taxable sales of \$68,400.00. When the tax rate of 8.25% was applied, it resulted in tax due on audited sales of \$5,643.00.

7. The Division issued to petitioner a Notice of Determination, dated June 17, 2003, which asserted additional sales and use taxes of \$5,643.00, penalty of \$1,396.18 and interest of \$992.35 for a total due of \$8,031.53.

8. A conference was held in the Bureau of Conciliation and Mediation Services on October 6, 2004, after which an order was issued which reduced the tax due to \$2,158.20 and cancelled the penalty asserted in the Notice of Determination. The conferee based the modification of the tax due on an adjustment of the gross sales per day to \$120.00 and an allowance for sales tax paid of \$99.00 for the quarter ended August 31, 2002.

9. Petitioner filed an annual New York State and Local Sales and Use Tax Return for the period March 1, 2001 through February 28, 2002, signed on February 27, 2002, in which he recited his business as a mobile food vendor and gross sales and services of zero (\$0.00). Petitioner filed a quarterly sales and use tax return for the period ended November 30, 2001, unsigned and undated, which set forth gross sales and services of zero (\$0.00). Petitioner also

filed a quarterly sales and use tax return for the period ended August 31, 2002, signed on August 14, 2002, which listed gross sales of \$1,200.00 and a tax due of \$99.00.

10. Petitioner filed a New York State Resident Income Tax Return for the year 2001 in which he claimed business income of \$3,640.00 from his activity as a food vendor and \$465.00 in business expenses, yielding a net profit of \$3,175.00. On the New York State Resident Income Tax Return for 2002, petitioner claimed gross income from his business as a food vendor of \$12,970.00 and business expenses of \$825.00, yielding a net profit of \$12,145.00. Petitioner claimed he was a sole proprietor, not an employee, for both years and accounted for the income as such, reporting his income as business income on line “6” of the returns and attaching Federal Schedule “C-EZ” (Net Profit from Business) in both years.

11. The Commissioner of Taxation and Finance issued a Certificate of Sales and Use Tax Remitted by a New York City Street Peddler to petitioner on July 24, 1992, for the period September 1, 1989 to May 31, 1992, which indicated that petitioner had paid \$100.00 in sales tax during that period. The sales tax identification number listed for petitioner on this form is the same one listed on the sales and use tax returns filed by petitioner for the audit period.

#### ***SUMMARY OF PETITIONER’S POSITION***

12. Petitioner contends that he was an employee of two different persons: Mahmoud Farouk Aly and Konstantinos Kostopoulos, and that he simply received a commission based upon his daily sales. Petitioner’s account of his business relationship with these two men was affirmed vaguely by two acquaintances who claimed to know these men. However, their testimony stopped short of indicating a knowledge of the legal relationship between them and petitioner or petitioner’s rationale in portraying his business activities in the manner he chose.

### **CONCLUSIONS OF LAW**

A. The record in this matter indicates that during the audit period, petitioner operated as a mobile food vendor and made sales of hot dogs, sausage, soda, water and hot pretzels, all of which were subject to sales tax. (Tax Law § 1105[d][i].) After two written requests for information and an interview by an investigator yielded no records or detailed information on petitioner's sales, the Division of Taxation resorted to external indices and information petitioner provided to determine sales and use taxes due from petitioner for the audit period.

B. The Division was justified in resorting to this methodology based upon the complete lack of records produced by petitioner. (*Matter of Urban Liquors v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138.) Further, the methodology, which was based upon office experience grounded in many similar audits and petitioner's verbal answers to the investigator, was reasonably calculated to reflect taxes due, and exactness in the outcome was not required. (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Your Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003.)

The Division having established a rational basis for the audit (*Matter of Grecian Square v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219), the burden was on petitioner to show by clear and convincing evidence that the methodology was unreasonable or the amount assessed was erroneous. (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679.) Petitioner has not objected to the methodology and, after successfully challenging the amount of tax due at conference and receiving a reduction in tax and abatement of all penalty, did not raise any arguments in this proceeding concerning the amount of tax left in issue.

C. Petitioner's sole argument centers on his contention that he is not responsible for any sales and use taxes on the sales he made from his mobile food cart because he was merely an

employee of two gentlemen who leased or owned the carts. Petitioner faces insurmountable problems with this argument due to his failure to submit any evidence of his purported employment relationship with the cart owners/lessors, such as W-2's or an employment agreement. Although two acquaintances credibly testified that petitioner operated mobile food carts owned or leased by these other gentlemen, they did not have personal knowledge of the employment relationship between petitioner and those individuals. Therefore, their testimony was not relevant to the issue of petitioner's employment.

What betrayed petitioner's assertion that he was an employee of the cart owners/lessors was his self-characterization on the Schedule C-EZ attached to his resident income tax returns for the years 2001 and 2002, wherein he admitted he was a sole proprietor of a food vendor business. For both 2001 and 2002, petitioner declared gross receipts and expenses of the business and noticeably left blank on both returns line "1", which provided space for the statement of wages, salaries and tips.

It is also pertinent to note that the Schedule C-EZ can only be used by an individual if the sole proprietorship has no inventory or expenses in excess of \$2,500.00 per year, uses the cash method of accounting and has no employees. Petitioner's food vending business met these requirements and he took full advantage of the allowance for business expenses to reduce his gross receipts, and the tax due thereon, in both years.

Despite petitioner's contention that he was confused by the requirements for filing sales and use tax returns (evidenced by his entry of no gross sales or tax due on the annual return) he filed an annual sales and use tax return for the period March 1, 2001 through February 28, 2002 and a quarterly sales and use tax return for the period ended August 31, 2002, in which he characterized himself as a mobile food vendor in business for himself, not an employee. On the

annual return, petitioner indicated he was a “d/b/a” on the label. On both returns, he listed a sales tax identification number, issued to those who register with the Department of Taxation and Finance as vendors and set forth on a certificate of authority, which petitioner maintained at least since September 1989. (Tax Law § 1101[d][8][i][A]; § 1134[a][2].)

D. Given petitioner’s own admissions and self-characterizations on his official filings with the Division and his lack of any evidence that he was an employee rather than a sole proprietor, he has failed to carry his burden of proof. (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; 20 NYCRR 3000.15[d][5].)

E. The petition of Mohammad Golamrabbani Sarkar is denied and the Notice of Deficiency, dated June 17, 2003, as modified by the Conciliation Order, dated December 10, 2004, is sustained.

DATED: Troy, New York  
May 25, 2006

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE